A

CHAN HAK FOON

v.

SUTERA HARBOUR RESORT SDN BHD & ANOR

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[CASE NO: K24-06-2006]
1 APRIL 2009

C ***CIVIL PROCEDURE:*** *Stay of execution - Application for - Application to stay execution of foreign judgment - Special circumstances - Whether arose - Whether equitable to allow conditional stay*

CIVIL PROCEDURE: *Judgments and orders - Stay of execution - Application to stay execution of registration of foreign judgment - Special circumstances - Whether arose - Whether foreign judgment a judgment in default and merits of claims not adjudicated yet - Whether equitable to allow conditional stay*

D

E The judgment creditor (JC) sustained injuries whilst staying at the hotel in Kota Kinabalu operated by the first judgment debtor. The JC commenced legal proceedings against the judgment debtors (JDs) in the Court of First Instance, High Court of the Hong Kong Special Administrative Region in 2003 and on 18 October 2005, the JC obtained a judgment in default of appearance against F the JDs in the Court of First Instance, High Court of the Hong Kong Special Administrative Region for a sum of HK$6,164,497 together with interest and costs ('the HK judgment'). On 13 December 2006, the JC obtained an order for registration of the HK judgment at the High Court in Kota Kinabalu. The JDs G then applied to the High Court in Kota Kinabalu to set aside the registration of the HK judgment but was unsuccessful which resulted in an appeal to the Court of Appeal against that decision. Pending the disposal of the appeal, the JDs filed this application for a stay of execution of the HK judgment.

H

Held:

(1) The JC resides outside Malaysia and if the appeal was successful it would be almost impossible for the JDs to recover I the money back. There was no affidavit evidence from the JC rebutting the allegations that he was not in a financial position to repay the money back if the appeal was successful. To a

certain extent he had confirmed his inability by affirming that he was presently not in employment. It was also not in dispute that he had no assets in Malaysia. Further, the HK judgment was a judgment in default which meant that the merits of the claims had not been adjudicated yet. The JDs had discharged the burden of proving that there were special circumstances in this case which would warrant a stay of the HK judgment. However, the JC had been injured eight years ago and had during this period used his own resource to pay for his medical care. The JC had also deposited a sum of RM200,000 as security for costs. After careful consideration of the circumstances of the application, it would be more equitable to allow stay until the disposal of the appeal to the Court of Appeal subject to the conditions set out.
(paras 15 & 19)

[Order accordingly.]

Case(s) referred to:

Australian Granodiorite Ltd v. Devex Ltd [1991] NSWCA 06 ***(refd)***

Hong Leong Finance Bhd v. Hon Hoi Weng & Ors [1987] 2 CLJ 227; [1987] CLJ (Rep) 656 HC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Lebbey Sdn Bhd v. Chong Wooi Leong & Anor [1998] 1 AMR 506 HC ***(refd)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***

Ngan Chin Wen v. Panin International Credit (S) Pte Ltd [2003] 3 CLJ 569 CA ***(foll)***

See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(refd)***

TAC Construction & Trading v. Bennes Engineering Bhd (No 2) [1999] 2 CLJ 518 HC ***(refd)***

Tan Tien Seng v. Grobina Resorts Sdn Bhd [2006] 6 CLJ 654 HC ***(refd)***

Yun Hing (Sabah) Sdn Bhd v. Sandakan Plywood & Veneers Co Sdn Bhd [1995] 2 CLJ 665 HC ***(refd)***

For the judgment creditor - Chin Yuen Fong; M/s Chin Lau Wong & Foo
For the judgment debtors - Catherine Chau; M/s Catherine Chau & Associates, Kota Kinabalu

Reported by Suhainah Wahiduddin

A

JUDGMENT

David Wong Dak Wah J:

Introduction

B **[1]** The judgment creditor (JC) sustained injuries whilst staying at the hotel in Kota Kinabalu operated by the 1st judgment debtor. The JC commenced legal proceedings against the judgment debtors (JDs) in the court of first instance, High Court of the Hong Kong Special Administrative Region in 2003 and on
C 18 October 2005, the JC obtained a judgment in default of appearance against the JDs in the court of first instance, High Court of the Hong Kong Special Administrative Region for a sum of HK$6,164,497, together with interest and costs ("the HK judgment"). On 13 December 2006, the JC obtained an order for
D registration of the HK Judgment at the High Court in Kota Kinabalu. The JDs then applied to the High Court in Kota Kinabalu to set aside the registration of the HK judgment but was unsuccessful which resulted in an appeal to the Court of Appeal on 3 December 2008 against that decision.

E

[2] Pending the disposal of the appeal, the JDs filed this application for a stay of execution of the HK judgment.

The Law

F **[3]** The approach in which the court should take in an application of such nature is succinctly set out by Abdul Hamid Mohamad JCA (as he then was) in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 and it is this:

G

> It appears to me that it is a unanimous view that to grant or not to grant a stay of execution pending appeal is an exercise of discretion by the court. Of course some judges merely use the word "discretion", some use the words "unqualified discretion" and some use the words "absolute and unfettered discretion". To me that does not really matter. The point is that, it is an exercise
> H of the discretion by the court on established principles.
>
> The approach taken by most judges appears to be that a successful litigant should not be deprived of the fruits of a judgment obtained in his favour, unless there are special
> I circumstances (or special grounds) that justify a stay of execution to be granted. The weight of authorities appears to me to say that the special circumstances must be special, not ordinary, common

or usual circumstances and that go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal). Many judges considered the question whether the appeal, if successful, is rendered nugatory under the head of special circumstances. (Sometimes, the phrase used is whether the appellant, if successful, can be restored to its former position). The general view appears to be that that is the more, if not the most, important factor of all. Of course, no one ever attempts to define special circumstances, for good reasons. It is also a common view that it depends on the facts of a particular case. Thus, "business realities" has been taken into consideration, I believe under this head. It is a common view that merits of the appeal (or correctness or validity of the judgment) is not special circumstances. Some judges do not use the term "special circumstances". They straight away consider whether the appeal, if successful, would be rendered nugatory. Examples are *Mohamed Mustafa and Gentali (M) Sdn. Bhd. v. Kawasaki Sunrock Sdn. Bhd.* [1996] 3 MLJ 597 (CA) and the term was used "in the sense that the appellant is deprived of the fruits of his success." I think it does not matter whether the nugatory factor is considered under the head "special circumstances" or not, so long as it is considered.

[4] The law also requires the JDs to show that there are special circumstances which I now deliberate on whether they have discharged that burden.

JDs' Grounds

[5] They can be summarized as follows:

1. There are merits in the appeal.
2. The appeal will be rendered nugatory.
3. The judgment is a default judgment.

Ground 1 – Merits In The Appeal

[6] Counsel for the JDs, Ms Catherine Chau, submits with some force that the court can and should take into account of the merit of the appeal together with other factors in considering whether there are special circumstances. Ms Chau relies on the judgment of Ian Chin J in *Yun Hing (Sabah) Sdn Bhd v. Sandakan Plywood & Veneers Co Sdn Bhd* [1995] 2 CLJ 665 where the learned judge said:

A It is not insignificant that in *Re Kong Thai Sawmill (MIRI) Sdn Bhd* [1976] 1 MLJ 131 at p 132, the Federal Court there speaks in these terms, *viz*:

> However, an allegation on an appeal that there has been a misdirection at the trial would not be sufficient to bring it within the special circumstances: *Monk v. Bartram.*

B

Similarly, the case of *Lee Kuan Yew v. Jeyaretnam JB* [1991] 1 MLJ 83, at p. 85, also speaks in a similar vein, *viz* 'However, the fact that there may be strong grounds for an appeal is not by itself a reason for granting a stay'.

C

Both these cases talk about insufficiency rather than it being totally irrelevant, the merit of an appeal being a factor bringing it within the meaning of special circumstances. Hence, I am of the view that the merit of an appeal though on its own may not be sufficient to constitute special circumstances, may be taken into consideration with other factors for the purpose of determining whether there are special circumstances.

D

I would respectfully, for the reasons I have given, differ in so far as *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd* [1989] 3 MLJ 40 were to decide that the merit of an appeal is under no event to be a relevant consideration.

E

[7] Ian Chin J's view is reflective of the approach taken in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299. This is how Gopal Sri Ram JCA puts it at p. 313:

F

> In my judgment, the paramount consideration governing an application for a stay, whether of execution or of proceedings, or, in the case of an application for some other form of interim preservation of the subject-matter of an appeal, such as the grant of an injunction or other appropriate relief under s. 44(1) of the Courts of Judicature Act 1964, is that the appeal to this Court, if successful, should not be rendered nugatory. If upon balancing all the relevant factors, this Court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then, it should normally direct a stay or grant other appropriate interim relief that has the effect of maintaining the *status quo*.
>
> But cases may arise where, in determining the critical question whether an appeal would be rendered nugatory, this Court comes to the conclusion that the point concerned in the pending appeal is obviously unarguable. In such cases it would not, as I perceive the law, be a proper exercise of discretion for this Court to shut its eyes to the practical realities of the situation and to nevertheless proceed to grant a stay.

G

H

I

> Take this very case. It is clear from the authorities that the substantive appeal, based upon a single point of interpretation, lacks all merit and is doomed to failure. In this state of affairs, would it be a proper exercise of discretion to permit a stay and cause a delay in the prosecution of the petition? I think not.

[8] Unfortunately the above views have been rejected by the Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1. This is what Augustine Paul FCJ said at p. 17:

> The merits of a party's case in a stay application is not a relevant matter for consideration. In this regard Lord Denning MR said in *TC Trustees Ltd v. JS Darwen* [1969] 2 QB 295 at p. 302:
>
> > In this very case the defendants, in their affidavit under RSC Ord 14 did raise a plea for equitable relief. But it was overruled, and judgment given against the defendants. It is not permissible to renew it again on an application for a stay of execution. ...
> >
> > It is true that the courts have an inherent jurisdiction to stay proceedings, but only on grounds which are relevant to a stay. It does not extend to grounds which are properly matters of defence of law or relief in equity, for those must be raised in the action itself.
> >
> > Mr Lipfriend raised a further point. He said that under RSC Ord 47 r. 1, there is power, in the case of a writ of fi fa, or elegit, to stay proceedings if there are special circumstances which render it inexpedient to enforce the judgment or in case the applicant is unable from any cause to pay the money. I think that is appropriate here. The circumstances there again are circumstances which go to the enforcement of the judgment: and not those which go to its validity or correctness.
>
> As Abdul Hamid Mohamad JCA (as he then was) said in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 at p.403:
>
> > The weight of authorities appears to me to say that the special circumstances must be special, not ordinary, common or usual circumstances and that go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal).

Lee Hun Hoe CJ (Borneo) said in the Federal Court in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Lin Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131 at p. 132:

> Allegations that there has been misdirection that the verdict of judgment was against the weight of evidence, or that there was no evidence to support the verdict or judgment, are not special circumstances on which the court will grant the application. See *Monk v. Bartram* [1891] 1 QB 346.

It is therefore unnecessary for me to consider the merits of the respective case of the applicants and respondents.

[9] Even though I prefer the views expounded in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Anor (supra)*, I am bound by the judgment of the Federal Court. Accordingly I decline the invitation of counsel to consider whether there are merits in the appeal of the JDs.

Ground 2 - The Appeal Will Be Rendered Nugatory

[10] The thrust of this ground is that the JDs would not be able to recover the judgment sum if the appeal is successful in view of the JC's status which Ms Chau sets out as follows:

1. He is an American residing in Hong Kong.
2. He has no assets in Malaysia.
3. There is no co-judgment creditor.
4. He is presently not in employment.

[11] Learned counsel also referred the court to the case of *Ngan Chin Wen v. Panin International Credit (S) Pte Ltd* [2003] 3 CLJ 569 where the facts were these. A judgment in default was obtained by the respondent against the applicant at the High Court in Singapore. The Singapore judgment was registered under the Reciprocal Enforcement of Judgment Act 1958 at the High Court in Malaya at Kuala Lumpur ('KL High Court') after an *inter partes* hearing. Application to strike out the respondent's application to register the Singapore judgment at the KL High Court was dismissed by the KL High Court which resulted in an appeal to the Court of Appeal against that decision. The applicant then applied to the KL High Court for a stay of execution of its decision pending the appeal but was unsuccessful. The applicant

then applied to the Court of Appeal for a stay of execution of the KL High Court's decision. That application was successful and the Court of Appeal by majority at p. 574 set outs its reasons why they granted a stay:

> Further, for the applicant, it is argued that the respondent which was based in Singapore did not have assets within the jurisdiction of this court. The judgment sum was substantial. If the applicant were to settle the judgment sum, there is strong likelihood that the applicant may not be compensated or restituted in the event of the applicant succeeding in the appeal. This would render the applicant's appeal nugatory. We agree.
>
> Question posed by the present application, should stay of execution of the court order dated 12 December 2001 be granted? In this regard, it is pertinent to refer to the Court of Appeal case in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380, where in that case, Hamid JCA at p. 405 observed:
>
> > I agree that in an application for a stay of execution, that the appeal, if successful, would be rendered nugatory is the "paramount consideration" or by whatever name it is called. And, I do not think that it matters whether it is considered under the head of "special circumstances" or not, so long as it is considered and so long as he does not go so far as to say that no other factors may be considered because this is an exercise of discretion, and therefore all the relevant factors should be considered.
> >
> > My difficulty with See Teow Guan if it were to be applied to an application for a stay of execution is that that the learned judge found that the appeal would be rendered nugatory because it is doomed to failure. As I understand it, the nugatory test that the courts talk about in an application for a stay of execution goes to the subject matter of the case, not the merits of the appeal. In other words, the appeal, if successful, is worthless because the appellant cannot be put in its former position.
>
> In *Alexander v. Cambridge Credit Corp Ltd* [1985] 10 ACLR 42 (refd), Kirby P, in delivering the judgment of the Court of Appeal of New South Wales, had this to say:
>
> > (i) where 'the balance of convenience' is in favour of the applicant/appellant (see also *AG v. Emerson & Ors; Clyne v. Deputy Commissioner of Taxation*); and such balance of convenience may sometimes be maintained by the stay being made subject to certain conditions imposed by the

court (as per provision '... may order ... on such terms as it thinks fit', in O. 45 r. 11 of the Rules, and also see *Andrews & Anor v. John Fairfax & Sons Ltd*);

(ii) where 'it is apparent that unless a stay is granted an appeal will be rendered nugatory ...' (see also *Wilson v. Church No 2* and *Scarborough v. Lew's Junction Stores Pty Ltd*); and

(iii) that the applicant/appellant 'has an arguable' appeal.

Thus, in applying the principles as enunciated above to the facts and

circumstances of the present case, we have no hesitation in finding that this is a proper case for stay to be granted. Accordingly, we order in terms as prayed. Cost to be in the cause.

[12] Counsel for the JC however submits that this inability to recover does not amount to a special circumstance and relies on the case of *TAC Construction & Trading v. Bennes Engineering Bhd (No. 2)* [1999] 2 CLJ 518 which held:

The permanent deprivation of moneys paid, or that the defendant would not be restored to its original position, or difficulty in recovering the moneys from the plaintiff, or that the plaintiff would not be in a position to reimburse the defendant did not amount to special circumstances even if the defendant succeeded on appeal.

[13] Learned counsel also referred to the *dicta* of Abdul Wahab Patail J in *Lebbey Sdn Bhd v. Chong Wooi Leong & Anor* [1998] 1 AMR 506 where he said:

The defendant's limited financial resources is a matter to take note of, but the court cannot deny the defendants, the exercise of a discretion of the court which would otherwise have been available to persons with financial resources. Justice should not depend on a person's means.

I am in accord with the views of my brother judges and I apply the principles enunciated therein vigorously to the factual matrix of the present case.

Undaunted the defendant argued that the plaintiff had omitted to produce proof of its financial standing and this court should conclude that the plaintiff was insolvent. But the onus was on the defendant's part, all along, to show to this court that the plaintiff

was insolvent. I did say something to that effect in the case of *Wu Shu Chen (Sole Executrix Of The Estate of Goh Keng How, Deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor* [1996] 2 CLJ 353.

[14] Having read and considered the submissions of respective counsels, I concur with Ms Chau that the JDs had shown that there exist special circumstances in this case which warrant this court to grant a stay.

[15] My reasons for my concurrence are the same as that in the case of *Ngan Chin Wen v. Panin International Credit (S) Pte Ltd (supra)* which in my view have same factual matrix as in this case. The JC as in that case resides outside Malaysia and if the appeal is successful it would in my view be almost impossible for the JDs to recover the money back. Not only that there is no affidavit evidence from the JC rebutting the allegations that he is not in a financial position to repay the money back if the appeal is successful. To a certain extent he had confirmed his inability by affirming that he is presently not in employment. It is also not in dispute that he has no assets in Malaysia. It is also noteworthy that the HK judgment is a judgment in default which means that the merits of the claims had not been adjudicated yet. This factor in my view is a relevant consideration to whether there exists special circumstances. His Lordship, VC George J in *Hong Leong Finance Bhd v. Hon Hoi Weng & Ors* [1987] 2 CLJ 227; [1987] CLJ (Rep) 656 makes a very important qualification to the principle of special circumstances and this is what he said:

> where a judgment is entered after a full trial of the issues (or in the case of an appeal, after a full hearing thereof) the general rule is that stay of execution pending appeal (or it applies, further appeal) will not be granted unless there are special circumstances

[16] His Lordship Ian Chin J also makes the same observation in *Yun Hing (Sabah) Sdn Bhd v. Sandakan Plywood & Veneers Co Sdn Bhd (supra)*:

> ... the most significant difference between *Monk v. Bartram* and the present case is that in our case there was no trial at all while in that case there was a trial with a jury and this is a relevant factor ...

[17] I have no reason to disagree with the two learned Lordships.

[18] So to recap it is my view that the JDs had discharged the burden of proving that there are special circumstances in this case which would warrant a stay of the HK judgment.

[19] However I cannot ignore the fact that the JC was injured some eight years ago and had during this period used his own resource to pay for his medical care. Neither can the court ignore the fact that the JC had deposited a sum of RM200,000 as security for costs. These two factors have prompted me to ask whether granting a stay on terms would be more equitable. The court's jurisdiction to make such an order is entrenched (see *Australian Granodiorite Ltd v. Devex Ltd* [1991] NSWCA 06, *Tan Tien Seng v. Grobina Resorts Sdn Bhd* [2006] 6 CLJ 654) and conceded by counsels.

[20] That being the case and after careful consideration of the circumstances of the application, I am of the opinion that it would be more equitable to allow stay until the disposal of the appeal to the Court of Appeal subject to the following conditions:

1. The JC is to deposit the sum of RM2,500,000 on or before 14 April 2009 in an interest bearing solicitors' clients' account jointly held and managed by the JC's solicitors and the JD's solicitors.

2. The said deposit together with all the interest accrued shall not be released except with the order of this court or the Court of Appeal and

3. On or before the 15th day of each month starting from the month of April 2006, the JDs' solicitors shall write to the registrar of the Court of Appeal to request for an early date of hearing of the JDs' appeal, with a copy to be extended to the JC's solicitors and the registrar of this court.

4. The conditional stay shall become unconditional if the JDs or their solicitors fail to comply with any of the conditions stated above.

[21] Pursuant to the application of the JC in encl. 125, I hereby order so.

[22] The costs shall be costs in the cause.